

UNITED STATES  
CIRCUIT COURT of APPEALS  
FOR THE NINTH CIRCUIT

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MASSACHUSETTS TRUST COM-  
PANY, a corporation,

*Appellant,*

*vs.*

LOON LAKE COPPER COMPANY,  
a corporation, and J. WEBSTER  
HANCOX, as Receiver of the  
LOON LAKE COPPER COM-  
PANY,

*Appellees.*

No. 4389

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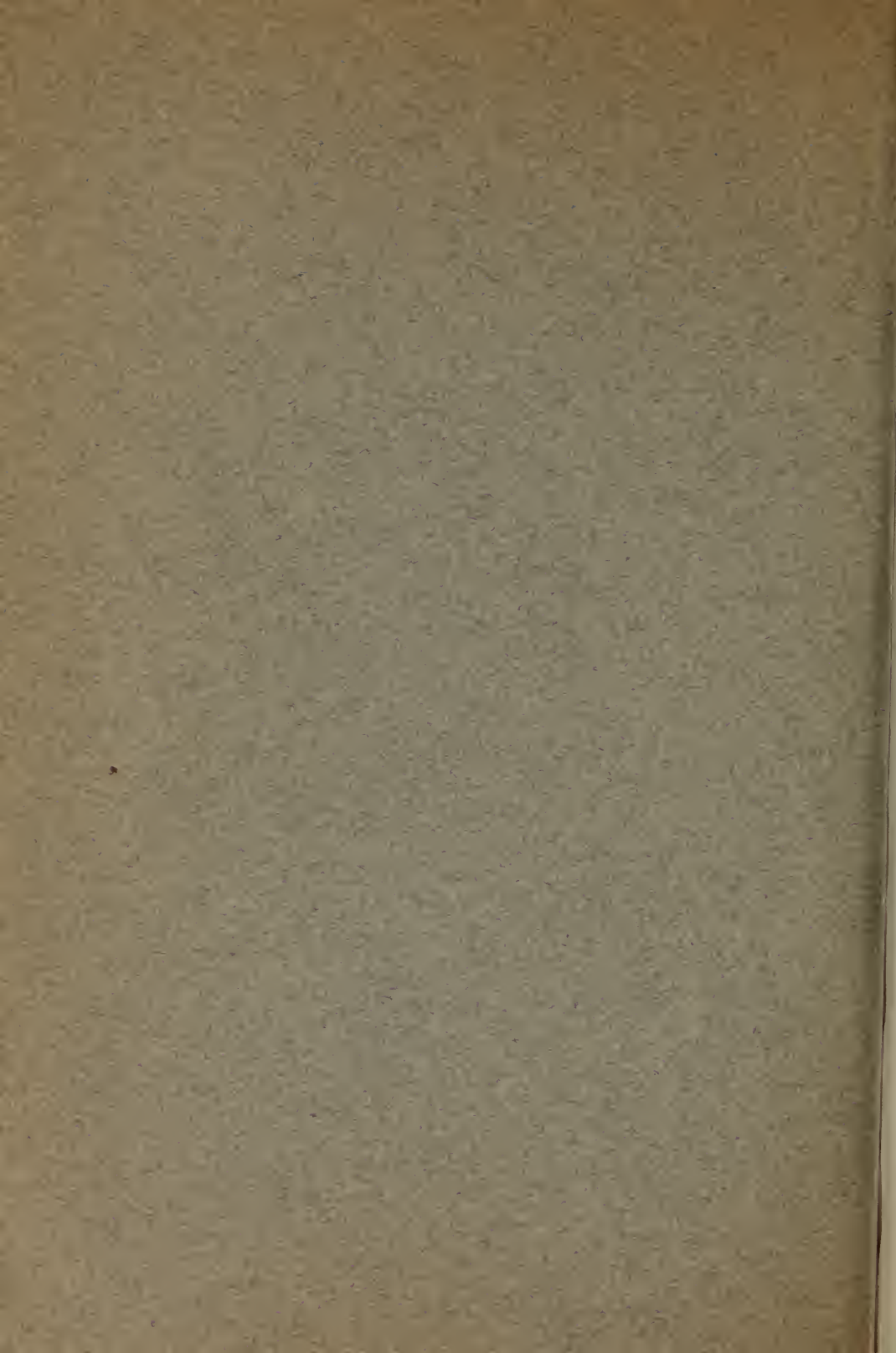
APPELLEES' BRIEF.

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*Upon Appeal from the United States District Court  
for the Eastern District of Washington,  
Northern Division.*

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J. WEBSTER HANCOX,  
*For Himself as Receiver,*  
SAMUEL R. STERN, and  
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*Attorneys for Receiver.*



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*Attorneys for Receiver.*

## STATEMENT OF THE CASE.

The Massachusetts Trust Company, Trustee, filed its Bill of Foreclosure in the District Court of the United States, in the Eastern District of Washington, Northern Division, on the 18th day of October, 1923, seeking to foreclose a trust deed given by the Loon Lake Copper Company, a Washington corporation, on property situated in Stevens County, Washington. This trust deed was for the purpose of securing a bond issue in the sum of \$90,000.00, issued by the Loon Lake Copper Company under date of November 15th, 1918. The ground for seeking foreclosure was that default had been made in the payment of both the principal and interest on said bonds. The defendants named were the Loon Lake Copper Company, a Washington corporation, and J. Webster Hancox, the Receiver of the Loon Lake Copper Company.

The Loon Lake Copper Company appeared in said action, and admitted the allegations of plaintiff's complaint. The Receiver appeared and filed his answer, denying certain allegations of the complaint, and setting up separate and affirmative defenses.

The Receiver admitted said instrument was a lien against the real property owned by the defendant, Loon Lake Copper Company, but denied that it was a valid lien against the personal property. He bases his reasons therefor, first, that the trust deed was signed and executed as a chattel mortgage on the 27th day of November, 1918, but was not filed for

record within the time required by law in the State of Washington, to-wit: Within ten days after the execution thereof; and, second, that the said trust deed, while executed as a chattel mortgage did not constitute a valid lien against the personal property acquired after the time of the execution of the mortgage. He also alleged that, while the bonds were issued in the sum of \$90,000.00, the actual amount of money received by the said Loon Lake Copper Company was the sum of \$60,000.00, and that said bonds were usurious contracts under the statutes of the State of Washington. (Rem. Comp. Statutes, Secs. 7299-7305.) He also alleged that all of the property owned by the Loon Lake Copper Company was subjected to the cost of the receivership in caring for and preserving the same.

The court, after hearing the testimony and argument of counsel, decreed a foreclosure in favor of plaintiff against the real property covered by the trust deed, but denied foreclosure as against the personal property. The District Judge decided the case on the ground that the mortgage was not filed as a chattel mortgage within ten days after its execution, as required by Remington's Compiled Statutes of the State of Washington, Section 3780:

“A mortgage of personal property is void as against all creditors of the mortgagor, *BOTH EXISTING AND SUBSEQUENT WHETHER OR NOT THEY HAVE OR CLAIM A LIEN UPON SUCH PROPERTY*, and against all subsequent purchasers, pledgees, and mortgagees and



encumbrancers for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law.”

### EVIDENCE.

The evidence in this case is brief. It shows that the Loon Lake Copper Company made a bond issue among its stockholders in the sum of \$90,000.00. It further shows, and the court so found, that for the \$60,000.00 paid, evidence of indebtedness of \$90,000.00 was to be issued by the company. (Tr. 27.) None of these bonds were introduced in evidence, nor was it shown that all the bonds were ever issued by the company. Thus, the Loon Lake Copper Company's stockholders were also the bondholders under this issue. The evidence further shows that Mr. Dewart, the attorney for the Massachusetts Trust Company was an officer at the time of this bond issue of the Loon Lake Copper Company. (Tr. 35.)

The evidence further shows that J. Webster Hancox was appointed Receiver of the Loon Lake Copper Company on December 29th, 1919; that a large number of claims have been filed with him, including claims for over \$9,000.00 for labor. (Tr. 36.) That he is still the acting Receiver, that the only assets

out of which expenses of the receivership can be realized is this property.

The trust deed bore date the 15th day of November, 1918, and provided that it should cover, among other property, the following:

*“All tangible personal property of every sort and description, whether now owned or hereafter acquired by the company.”* (Tr. 28.)

The concluding provision in the trust deed was inserted after the original deed was drawn, and is as follows:

*“Although this Indenture is dated for convenience and for the purpose of reference as of NOVEMBER 15, 1918, the actual date of the execution hereof is NOVEMBER 27th, 1918.”* (Tr. 53.)

The date “November 27th, 1918” is in the handwriting of Arnold Whitaker, who is the secretary of the Massachusetts Trust Company. (Tr. 36.)

The concluding words of the trust deed are as follows:

*“IN WITNESS WHEREOF, Loon Lake Copper Company has caused its corporate seal to be hereto affixed and these presents to be SIGNED, ACKNOWLEDGED AND DELIVERED in its name and behalf by its President and Secretary, thereunto duly authorized, and Massachusetts Trust Company, in token of its ACCEPTANCE of the trusts hereby created, has also executed these presents this TWENTY-SEVENTH DAY OF NOVEMBER, A. D. 1918.”* (Tr. 53.)

Then follows the signing and witnessing of said trust deed, as follows:

<p>“Executed in duplicate. <i>Signed, sealed and Delivered</i> in the presence of Merritt Stegmon <i>Signed, sealed and Delivered</i> in the presence of Merritt Stegmon</p>	<p>Loon Lake Copper Company By James C. McCormick, <i>President</i> By Ralph L. Flanders, <i>Secretary</i> Corporate seal: Loon Lake Copper Company, Washington. Massachusetts Trust Company By Edgar R. Champlin, <i>President</i> Arnold Whittaker, <i>Secretary</i> Seal: Massachusetts Trust Company, Boston, Mass., Incorporated 1914.” (Tr. 54.)</p>
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Then follows the affidavit of good faith, made in pursuance of the laws of the State of Washington, by James C. McCormick, President, and Ralph L. Flanders, Secretary of the Loon Lake Copper Company, and subscribed and sworn to on the 27th day of November, 1918, before A. Whitaker. (Tr. 54-55.)

Then follows the acknowledgment of the Loon Lake Copper Company, and the attaching of its corporate seal by its President, James C. McCormick and its Secretary, Ralph L. Flanders, before A. Whitaker, made on the 27th day of November, 1918. (Tr. 55-56.)

Then follows the acknowledgment of the Massachusetts Trust Company by Edgar R. Champlin and Arnold Whittaker, President and Secretary, respectively, of said Massachusetts Trust Company, made on the 29th day of November, 1918. (Tr. 56-57.)



The trust deed was filed for record at Colville, Stevens County, Washington, on December 11th, 1918. (Tr. 57.)

The appellant attempted to show, contrary to the terms of the trust deed, that delivery and acceptance took place on December 4th, 1918, and introduced for that purpose the deposition of Mr. Whittaker, which was received in evidence over the objection of the Receiver.

Mr. Whittaker testified that the trust deed was delivered to them and acknowledged by them on the dates as shown on the instrument; that it was their custom not to accept an instrument until their attorney had passed upon same; that they, therefore, sent the same to their attorney, who, on December 4th, 1918, sent the same to be recorded. (Tr. 30-34.)

Mr. Dewart, the attorney for the plaintiff, testified that he was an officer of the Loon Lake Copper Company; that the money received from the sale of the bonds was used in the purchase of machinery, and other supplies, and that the money was expended after the bond issue was made, within the following year. (Tr. 34-35.) That practically all the bonds sold were purchased by the stockholders of the Loon Lake Copper Company. (See stipulation.)

The defendant Receiver duly and regularly entered his objections to all the testimony of Mr. Whittaker and Mr. Dewart. (See Stipulation on file.)

## ARGUMENT.

Counsel for appellant, cites, and quotes from authorities to prove that execution of a deed is not complete until the instrument is delivered and accepted. The authorities would be in point if we were attempting to rely on the date of this instrument, to-wit: November 15th, 1918, as the date of its delivery. However, the authorities are beside the point in this case. The signing, acknowledging and delivering are all steps in the execution. The instrument under consideration specified the date of execution thereof:

“ALTHOUGH THIS INDENTURE IS DATED FOR CONVENIENCE AND FOR THE PURPOSE OF REFERENCE AS OF NOVEMBER 15, 1918, THE ACTUAL DATE OF THE EXECUTION HEREOF IS *NOVEMBER 27th, 1918.*”

It also specifies the date of its *delivery and acceptance* thereof, to-wit: The 27th day of November, 1918.

“IN WITNESS WHEREOF, Loon Lake Copper Company has caused its corporate seal to be hereto affixed and these presents to be SIGNED, ACKNOWLEDGED AND DELIVERED in its name and behalf by its President and Secretary, thereunto duly authorized, and Massachusetts Trust Company, in token of its *ACCEPTANCE* of the trusts hereby created, has also executed these presents this *TWENTY-SEVENTH DAY OF NOVEMBER, A. D. 1918.*”

The question then before this court is whether the evidence in this case is sufficient to vary the terms of

this written instrument and establish the date of delivery as December 4, 1918, in lieu of November 27, 1918. We submit that there is no evidence whatsoever that would justify the court in taking any other position than that the instrument contained a recital of the true facts relative to both the time of delivery and acceptance of this instrument. Testimony given over five years after the completion of this transaction by a party in interest, and of hearsay nature, we submit is worthless to contradict the terms of this written instrument. Measured by the rule of substantive law governing the admission of evidence, the evidence in this case is of little or no weight. Especially is this true when brought into direct conflict with the terms of an instrument duly executed and which particularly stipulates that the date of *delivery and acceptance*, as well as execution, was November 27, 1918.

“It has been said, however, that in the trial of equity cases the rule seems to be that courts are very liberal in the admission of evidence, the theory being that in the final determination of the suit only such evidence as is competent and pertinent to the issues will be considered.”

21 *C. J.*, p. 559;

*Wigmore on Evidence*, Sec. 2400.

We submit that the lower court, sitting as a court of equity, was justified in refusing to give weight or credence to the testimony introduced to vary the terms of this trust deed as to the time of execution. The District Court rightfully disregarded this testimony,

and held that the recitals of the instrument were binding upon the Trustee therein named, as well as upon the Loon Lake Copper Company.

### LAW POINTS AND AUTHORITIES.

“A mortgage of personal property is void as against all creditors of the mortgagor, *BOTH EXISTING AND SUBSEQUENT WHETHER OR NOT THEY HAVE OR CLAIM A LIEN UPON SUCH PROPERTY*, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law.”

Section 3780 of Remington's Compiled Statutes of Washington.

This Section has been construed and holds that in case the provisions are not complied with, said mortgage as to creditors is absolutely void.

*Clark vs. Kilian*, 116 Wash. 532;  
*Fleming vs. Lincoln Trust Co.*, 124 Wash. 317.

### I.

The parties to this instrument by stipulating the date of execution, and making it a part of the instrument, became bound by its terms.

“But when the parties to a written agreement

have made the date of the instrument a material part of the contract, as when the time of performance is fixed with reference to it, parol evidence is not admissible to vary or change it."

9 *Ency. of Evidence*, p. 368.

When the parties hereto stipulated that

"Although the instrument bore date of November 15th, the actual date of execution hereof is November 27th, 1918."

they made this a part of their agreement, and became bound by its provisions.

"An intrinsic agreement providing a *condition qualifying* the operation of a written obligation is of course equally ineffective; for an obligation absolute is plainly exclusive of a condition."

*Wigmore on Evidence*, Sec. 2420.

Especially is this true as to third parties, and when this instrument was filed for record, the creditors examining it would be permitted to rely on the date of execution as being that of November 27th, 1918.

This instrument states that it was executed, delivered and accepted on November 27th, 1918. This provision brings the instrument within the following rule:

"\* \* \* where the document is of that sort which permits third persons to acquire independent rights under it, the conduct of the first party, in so dealing with it that as a reasonable consequence it appears to have been delivered, may charge him, even when he has not actually intended to consummate its delivery."

*Wigmore on Evidence*, Sec. 2420.



## ACCEPTANCE NOT NECESSARY

It was not necessary for the Massachusetts Trust Company to formally accept this instrument, in order to complete its delivery, as the rule is:

“It is not essential to the validity of a deed of trust given as security for a debt that the trustee named therein should accept or assent to it. The instrument need not be delivered to him in order to become operative; and if he refuses to accept or to execute the trust, another trustee may be substituted, or the trust executed under the direction of the court of equity.” \* \* \*

27 *Cyc.*, 1118;

*Field vs. Arrowsmith*, 39 *Amer. Dec.* 185;

*Walter vs. Johnson*, 37 *Tex.* 127.

“Acceptance by a trustee under a trust deed is presumed from time of delivery to him.”

19 *R. C. L.*, 280;

*Bozden vs. Parrish*, 9 *S. E.* 616.

There can be no doubt under the testimony but what the Loon Lake Copper Company executed and delivered this instrument as a binding trust deed on the 27th day of November, 1918. It not being necessary for the Massachusetts Trust Company to accept thereunder, the testimony introduced by plaintiff, even if admissible, would not change the fact that the execution and delivery by the Loon Lake Copper Company made this a binding obligation.

It would make no difference whether the Massa-

chusetts Trust Company ever accepted this instrument or not. The question would be when the mortgagor actually delivered this instrument. Under the testimony, and under the trust deed, introduced in evidence here, it is apparent that the execution, including delivery, took place on November 27th, 1918. It is also equally apparent that the Massachusetts Trust Company accepted (even though it was not necessary for them to do so to complete the delivery) their duties on the same date.

We submit, therefore, that under the covenants in this trust deed, that the date of execution and delivery and acceptance by all the parties to this instrument as being November 27th, 1918, is controlling in this case.

We submit further that under the law, delivery of this instrument took place on said date, and said instrument became binding on said date, and that the District Court was correct in holding that the lien created by said trust deed was not a lien against the personal property of the Loon Lake Copper Company, as against the rights of the creditors represented by the Receiver in this action.

## II.

The second reason why this decree of the lower court was correct, but upon which point the lower court did not rule, was that after-acquired property was not covered by this instrument. It will be noted

by the above quoted provision from the trust deed that this instrument covered "all tangible personal property of every sort or description, whether now owned, or hereafter acquired by the company." The evidence in this case shows that all the personal property which this Receiver is claiming title to free of the lien of this trust deed was purchased after the execution and filing of the trust deed. (Tr. 34.)

In the State of Washington, where this contract was to operate, the statute covering personal property which may be mortgaged is as follows:

"PROPERTY SUBJECT TO.—Mortgages may be made upon all kinds of personal property, and upon the rolling stock of a railroad company and upon all kinds of machinery, and upon boats and vessels, and upon portable mills, and such like property, and upon growing crops and upon crops before the seed thereof shall have been sown or planted; Provided, that the mortgaging of crops before the seed thereof shall have been sown or planted, for more than one year in advance, is hereby forbidden, and all securities or mortgages hereafter executed on such unsown or unplanted crops are declared void and of no effect, unless such crops are to be sown or planted within one year from the time of the execution of the mortgage."

*Remington's Compiled Statutes of Wash.*, Sec. 3779.

Under the common law, after-acquired personal property is not subject to the lien of a chattel mortgage.

“At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence and belonging to him.”

*Jones on Chattel Mtgs.*, Chap. IV, Sec. 138.

Upon either theory the trust deed sued upon in this action is not a lien against the personal property to which this Receiver is laying claim of title.

The trust deed, we believe, is void as to the creditors, for the reasons set forth herein, yet we wish to submit that the property covered by the trust deed should be first subject to the Receiver's fees and expenses in preserving the same.

23 *R. C. L.*, Sec. 119;

*High on Receivers*, Sec. 809;

*Dalliba vs. Wurschell*, 82 Pac. 107;

*Knickerbocker vs. McKinley*, 50 N. E. 330 (Ill.);

*Hooper vs. Central Trust Co.*, 32 Atl. 505;

*Farmers' Loan vs. Bankers' Telephone*, 31 L. R. A. 403 (N. Y.);

*City Bank vs. Bryan*, 86 S. E. 8 (W. Va.);

*Huling vs. Jones*, 60 S. E. 874;

*Orchard vs. Exchange Nat'l. Bk.*, 98 S. W. 824;

*Herzert vs. Walters*, 119 Pac. 705 (Ida.).

Respectfully submitted,

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 ALBERT I. KULZER,  
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